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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD MARTINEZ, Defendant and Appellant.	G040555 (Super. Ct. No. 07CF1450) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Meredith A. Strong and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Edward Martinez of attempted carjacking (Pen. Code, §§ 215; 664, subd. (a); all statutory references are to this code), active participation in a criminal street gang (§ 186.22, subd. (a)), and found to be true the allegation he committed attempted carjacking "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)). Defendant challenges the sufficiency of the evidence to sustain the convictions and gang enhancement, and argues the trial court should have stayed the term imposed for active gang participation. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Shortly before midnight on April 26, 2007, Elideth Cruz was driving her sister home in Santa Ana with her two young children in the car. She pulled over to let her sister out in front of their parent's home but left the engine running and the headlights on. Suddenly, a burgundy SUV pulled alongside Cruz's car. A young man with a covered face and wearing a hooded, black sweatshirt and jeans emerged from the passenger side of the SUV, closed his door, and tried to open Cruz's door. He appeared to have something black in his other hand. Cruz pulled the door shut but accidentally rolled down the window as she tried to lock the doors. The assailant tried again to open the door. Cruz pleaded with him not to do anything because she had children in the car. The SUV's driver emerged and stood in front of the SUV, leaving his door open with the engine running and the lights on. The hooded man looked at the driver and gestured to ask "is it okay?" The driver nodded and said "all right," indicating for his cohort to let Cruz go. As the men fled the scene in their SUV, Cruz wrote down the license plate number.

Cruz's mother telephoned 911 and the police arrived about 10 minutes later. Approximately an hour and 15 minutes after the crime, officers stopped an SUV matching Cruz's description at a gas station about five miles from the crime scene. Cruz, her sister, and their stepfather identified the SUV, which had a license plate number one digit off from the one Cruz gave investigators. The SUV was driven by and registered to defendant. Cruz identified defendant and defendant's passenger, Zabdiel Rivas, by their stature and clothing. Officers found a black ski mask in the SUV's cargo area behind the third row seat.

Defendant, who lived in Garden Grove, told officers he was at home until 10:00 p.m. He felt restless and decided to go for a drive. He parked near his home for awhile to "contemplate and review things in his life . . . ." He then decided to locate a friend, but spotted his friend Rivas walking alone on the street and persuaded him to go with him to get gas and doughnuts. Officers detained them at the gas station. Confronted with the evidence against him, defendant stated he did not "see how it led up to his involvement in the crime."

Garden Grove Police Officer George Kaiser testified as an expert witness on gangs. He opined defendant and Rivas were actively participating in a Garden Grove criminal street gang on April 26, 2007. Rivas admitted to Kaiser a few weeks earlier he had been jumped into the gang at age 15 and previously admitted in court he had stolen a car to benefit the gang. Rivas also showed Kaiser the hand signs for the gang. As for defendant, Kaiser emphasized defendant had family members and acquaintances in the gang and had written several letters from jail suggesting a gang-oriented mentality. The gang's territory included the area where defendant picked up Rivas and where officers stopped the SUV. Kaiser explained gang members steal cars to enhance their status within the gang and community, and to facilitate commission of other crimes by using an untraceable vehicle. Finally, Kaiser concluded the facts showed defendant had supervised Rivas's criminal endeavors, which was consistent with a younger gang

member (Rivas) "putting in work for the gang," i.e., proving himself to other members of the gang.

One of defendant's sisters testified defendant was home between 10:00 and 10:30 p.m. on the night of the incident. She went to sleep around 10:30 and woke up after 1:00 a.m., when police called to say defendant had been arrested. She told an officer defendant took a shower and she heard his car start around 11:00 p.m. Another sister testified she arrived home shortly before midnight and defendant's SUV was not parked in front of the house. Once inside the house she "bumped into" her brother in the living room. She asked about his truck and he said "don't worry about it." Both sisters testified defendant routinely let family and friends borrow his vehicle. A cousin said she saw defendant in the house watching television around 11:20 p.m.

Following a trial in March and April 2008, the jury convicted defendant of the charged crimes, and found the gang allegation to be true. Defendant admitted serving a prior prison term within the meaning of section 667.5, subdivision (b). The court imposed an aggregate prison term of nine years and two months comprised of a midterm 30-month sentence for attempted carjacking, a consecutive five-year term for the gang enhancement, a consecutive eight-month term (one-third midterm) for active gang participation, and a consecutive one-year term pursuant to section 667.5, subdivision (b).

II

DISCUSSION

A. *Substantial Evidence Supports the Attempted Carjacking Conviction*

Defendant challenges the sufficiency of the evidence to support his conviction for attempted carjacking. He asserts the prosecution failed to show he or Rivas intended to take Cruz's vehicle. We find the contention unpersuasive.

Our review of claims contesting the sufficiency of the evidence is limited. Where the record presents substantial evidence on which a reasonable trier of fact could

find the defendant guilty, we may not disturb the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

Defendant argues the evidence showed only that Rivas contemplated a robbery, and not carjacking. He argues "[t]here was no evidence . . . Rivas reached for, or demanded, the car keys. [He] did not get in the vehicle and attempt to drive away. There was no evidence [he] and [defendant] had a particular motive to commit a carjacking instead of a robbery. The evidence suggests that a robbery was probably contemplated. . . . The conduct of . . . Rivas and [defendant] was too ambiguous to conclude they intended to take [Cruz's] car."

We do not find the evidence too ambiguous or uncertain to support the carjacking conviction. For instance, the jury could reasonably conclude Rivas closed his car door after exiting defendant's SUV because he intended to make his getaway in Cruz's vehicle. It certainly is a reasonable inference that Rivas would have left his side door open if his intent merely had been to rob Cruz of her possessions and flee the area with defendant. Because Rivas shut the passenger door, the jury therefore could surmise he and defendant intended to take Cruz's vehicle. Also, the decision to abandon the crime after learning Cruz's children were in the car suggests the assailants planned to take Cruz's car. Kaiser explained gang members consider crimes against young children "off-limits." Here, the children would have been potential victims had defendant

proceeded with the carjacking, but the presence of toddlers in the back seat would not have hindered Rivas from robbing Cruz of her personal items if that had been his intent. Finally, the jury reasonably could rely on the gang expert's testimony that gang members steal cars to use in other crimes. The evidence showed defendant and his young apprentice belonged to the same gang and therefore set their sights on Cruz's car so their gang could use it to commit other crimes. We conclude the evidence supported the jury's conclusion Rivas and defendant intended to take Cruz's car.

B. *Substantial Evidence Supports the Gang Conviction*

Defendant challenges the sufficiency of the evidence to support his conviction for active gang participation under section 186.22, subdivision (a), arguing the evidence failed to show his attempted carjacking was gang-related rather than a personal endeavor. We disagree.

Section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

This offense contains three elements: "Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element . . . . The second element is 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and the third element is that the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Assuming the third element requires gang-related criminal conduct rather than any felonious conduct by

a gang member, ample evidence demonstrates defendant's attempted carjacking was gang-related.

Here, the jury could reasonably conclude the crime was prompted by a gang-related objective because defendant and his accomplice belonged to the same gang and sought to take the victim's vehicle, a crime that enhances the prestige of the offender within the gang and provides a potentially untraceable car to use in other gang crimes. Evidence defendant's accomplice was the primary assailant and looked to defendant for permission to abandon the enterprise when he learned the victim's young children were in the car supported the expert's opinion younger members prove their mettle in gang crimes under the supervision of an older, more experienced member, and that crimes against children are prohibited in the gang subculture. The foregoing constitutes substantial evidence supporting the jury's verdict.

C. *Substantial Evidence Supports the Gang Enhancement*

Defendant also attacks the sufficiency of the evidence to support the gang enhancement under section 186.22, subdivision (b)(1). Specifically, defendant contends the gang expert's testimony "was the only evidence offered to prove [defendant] committed the attempted carjacking to benefit a gang" but "[h]is testimony . . . failed to prove [defendant] committed the attempted carjacking to benefit his gang or that he committed the crime with the specific intent of promoting his gang." We reject defendant's argument because it fails to account for the alternative means by which a defendant may incur liability under the statute.

Section 186.22, subdivision (b)(1), provides for a sentencing enhancement where a "person . . . is convicted of a [specified] felony [including attempted carjacking] committed for the benefit of, at the direction of, *or in association with* any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (Italics added.) Thus, the statute's "disjunctively worded elements"

provide three separate and alternative means to impose liability. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 162 (*Leon*).)

Where a defendant commits a felony with a gang member, he has committed the crime "in association" with the "criminal street gang" and the jury may infer an intent to assist criminal conduct by gang members. (*Leon, supra,* 161 Cal.App.4th at p. 163.) Here, "the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) As *Morales* explains, specific intent to benefit the gang is not required. "What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members. . . .' Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with [others], and that he knew [the others] were members of his gang. . . . It was fairly inferable that he intended to assist criminal conduct by his fellow gang members." (*Ibid.*) Like the facts in *Morales*, substantial evidence supported the conclusion defendant helped Rivas, a fellow gang member, with the specific intent to assist Rivas's in taking Cruz's vehicle.

Defendant fares no better even if we focus on the benefit prong. The prosecution may establish the elements of the gang enhancement by expert testimony. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.) Here, Officer Kaiser opined gangs commit carjackings to increase respect within the gang and to facilitate the commission of other crimes, and that young gang members must commit crimes for the gang to prove themselves. Based on Kaiser's expert testimony, the jury could reasonably infer defendant committed attempted carjacking for the benefit of, at the direction of, or in association with the gang, and with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Defendant asserts Kaiser's testimony gang members use "stolen vehicles to commit other crimes" was "pure speculation" and the "fact that the carjacking was

abandoned meant that no further crimes were committed with the car" and the prosecution presented no "evidence relating to other potential crimes for which use of the stolen car was contemplated." At trial, defendant failed to challenge the foundation for Kaiser's opinion gang members steal cars to use in other crimes. Thus, it was up to the jury to determine whether defendant and Rivas *in fact* wanted Cruz's car to use in other crimes, to enhance their standing within the gang, or to provide Rivas with a training exercise. In any event, as noted above, an intent to assist criminal conduct by fellow gang members suffices, and the evidence established defendant assisted Rivas in the carjacking, which supports a reasonable inference he intended to assist the criminal conduct by his fellow gang member.

Defendant relies on *People v. Albarran* (2007) 149 Cal.App.4th 214, a case that did not concern the sufficiency of the evidence to support a gang enhancement. There, the trial court dismissed the case against the defendant after granting the defendant's motion for a new trial. The issue on appeal was whether defendant's constitutional right to a fair trial was violated when the trial court admitted gang evidence that was "completely irrelevant and highly prejudicial." (*Id.* at p. 217, 222; see *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 ["It is axiomatic that cases are not authority for propositions not considered"].) And in *Albarran* the expert conceded the circumstances of the shooting made it impossible to determine whether the motive for the shooting was gang-related. (*Albarran*, at p. 227.) *Albarran* therefore does not support defendant's argument.

Defendant also relies on federal authority holding the specific intent element of section 186.22, subdivision (b), is not satisfied by evidence the defendant had the intent to assist a fellow gang member in any criminal conduct; rather the specific intent must be to facilitate other criminal activities by gang members. (*Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103; see also *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1079, fn. 3.) As lower federal court decisions, these cases are not binding

on this court. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 882.) We agree with other California appellate decisions that these federal cases have misinterpreted section 186.22. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 20; cf. *Briceno*, at pp. 1084-1089 (conc. & dis. opn. of Wardlaw, J.).) Accordingly, we conclude substantial evidence supports the jury's finding on the gang enhancement.

D. *Defendant Did Not Receive Multiple Punishments in Violation of Section 654*

Defendant contends the trial court erred when it failed to stay punishment on the gang conviction under section 654. Defendant argues the gang conviction and gang enhancement "were based on the same criminal conduct of committing an attempted carjacking" and the trial court erred by failing to say punishment for the gang conviction under section 654.

We rejected the identical argument in *People v. Garcia* (2007) 153 Cal.App.4th 1499, and see no reason to deviate from our earlier holding. "Section 654 prohibits multiple sentences where a single act violates more than one statute, or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. [Citation.] To be convicted of street terrorism under section 186.22, subdivision (a), a defendant must 'have the intent and objective to actively participate in a criminal street gang,' but need not have the intent to personally commit any specific felony. [Citation.] [¶] When a defendant commits a crime for the benefit of a criminal street gang, he or she may have two independent but simultaneous objectives — to commit the underlying crime and to benefit the gang. [Citations.] Thus, section 654 does not prohibit punishing a defendant both for violating section 186.22, subdivision (a) and for the underlying crime committed for the benefit of the gang when the two offenses involve different objectives. [Citations.]" (*Id.* at p. 1514.)

Here, the evidence showed defendant aided and abetted Rivas in attempting to carjack Cruz's vehicle and also committed the crime to promote or assist his gang. While he might have pursued these objectives simultaneously, the trial court could reasonably find they were independently pursued. Consequently, we conclude the trial court did not violate section 654.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.